

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78 - 135

ARNOLD R. JAGO, Superintendent,

Petitioner,

vs.

HARLEL B. JONES,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Respondent, Harllep B. Jones, submits this brief in opposition to the Petition of Arnold R. Jago that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this matter on May 3, 1978.

Opinions Below

The opinion of the United States Court of Appeals for the Sixth Circuit, included in Petitioner's Appendix at p. A1, is reported at 575 F.2d. 1164 (6th Cir. 1978). The opinion of the Federal District Court for the Northern District of Ohio, included in Petitioner's Appendix at p. A11, is reported at 428 F.Supp. 405 (N.D. Ohio 1977).

Question Presented

Whether the court below correctly concluded, in light of this Court's decisions in Brady v. Maryland, 373 U.S. 83 (1963),

Moore v. Illinois, 408 U.S. 786 (1972) and United States v. Agurs, 427 U.S. 97 (1976), that a defendant charged with aiding and abetting murder, in a case whose outcome depends entirely on the jury's evaluation of the credibility of the witnesses, is denied due process of law by the prosecution's suppression, in the face of specific and timely defense requests for disclosure, of a statement provided to the police by a participant in the killing, when that statement makes no mention of defendant's involvement in the crime and otherwise contradicts the testimony of the prosecution's key witness, whose credibility was already open to attack, and when such suppression, combined with the prosecution's conduct in dismissing all charges against the author of the statement and in having him declared a material witness for the state, effectively prevents the defendant from using the author of the statement as a witness at trial?

Statement of the Case

In general, Respondent is prepared to rely on the facts set forth in the opinions of the District Court and the Court of Appeals, which are included in Petitioner's Appendix and officially reported at 428 F.Supp. 405 (N.D. Ohio 1977), 575 F.2d 1164 (6th Cir. 1978), respectively.

Petitioner's statement is essentially correct. Respondent would, however, point out that Petitioner's assertion, included in the statement at p. 4 and repeated elsewhere in the Brief at pp. 8-10, that Respondent's attorney also represented Victor Harvey must be qualified. Although Respondent's attorney represented Victor Harvey shortly after the time that the indictments were returned in the instant case, he no longer represented Harvey at the time of Respondent's trial or at the time, prior to Respondent's trial, when the requests were made for the disclosure of Harvey's statement. See Joint

Respondent would further point out that Petitioner's recitals that "Victor Harvey was freely available to the defense" and that the defense was "free to call Harvey if they desired" (Petitioner's Brief at p. 5) are wholly at odds with the explicit and unassailable findings of fact made by the District Court and affirmed by the Court of Appeals. In point of fact the District Court found not only that "the defense was restrained" and "effectively prevented ... from using Victor Harvey as a witness", but also that "this was the effect of the State's actions." 428 F.Supp. at 410-411; Petitioner's Appendix at p. A21-22. The Court of Appeals sustained these findings. 575 F.2d at 1167 - 1168; Petitioner's Appendix at p. A7.

Reasons For Denying The Petition

I

The Decision Below Does Not Conflict
With Either The Decisions Of This
Court Or The Decisions Of Other
Circuit Courts Concerning The
Prosecution's Constitutional Duty To
Disclose Exculpatory Evidence
Specifically Requested By A
Criminal Defendant

Petitioner has characterized the ruling below as "a decision on an important question of constitutional law that conflicts with the decisions of this Court," Petitioner's Brief at p. 6. But, quite to the contrary, the decision of the Sixth Circuit is in complete harmony with the leading decisions of this Court in Brady v. Maryland, 373 U.S. 83 (1963), Moore v. Illinois, 408 U.S. 786 (1972); and United States v. Agurs, 427 U.S. 97 (1976) as well as with the decisions of other Circuit Courts.

Under the law announced in Brady, Moore and Agurs, supra, one who seeks to show a violation of due process must establish three factors: (1) the prosecution's suppression of evidence; (2) the favorable character of the evidence for the defense,

and (3) the materiality of the suppressed evidence to the issue of guilt or punishment. The determination of materiality is made by evaluating the suppressed evidence "in the context of the entire record." Agurs, supra at 112 (footnote omitted). Moreover, the determination of materiality turns on the standard employed.

When the defense has failed to specifically request disclosure of the suppressed evidence, the evidence will be regarded as material and a denial of due process can be found only "if the omitted evidence creates a reasonable doubt that did not otherwise exist." Agurs, supra at 112. However, when the suppressed evidence has been specifically requested by the defense, a less stringent standard of materiality is employed. Agurs, supra at 106.¹ In such a case, as this Court stated in Agurs, id:

[I]f the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.

In affirming the grant of habeas corpus relief to Respondent, the court below rendered a decision which is wholly in accord with the foregoing well-settled propositions of law. There was never any dispute as to the prosecution's failure to disclose the statement of Victor Harvey to the defense.

1. Every Circuit Court decision which has spoken to this matter in the wake of Agurs has agreed on this point. See eg., United States v. McCrane, 547 F.2d 204, 207 (3rd Cir. 1976) on remand from 427 U.S. 910 (1976); Cannon v. State of Alabama, 558 F.2d 1211, 1213 (5th Cir. 1977); United States v. Mackey, 571 F.2d 376, 388 - 89 (7th Cir. 1978); Skinner v. Cardwell, 564 F.2d 1381, 1384-85 (9th Cir. 1977).

On the question of the statement's favorable character to the defense, the Circuit Court concurred in the District Court's finding of fact that, in light of the attendant circumstances, the statement was exculpatory. 575 F.2d at 1166-67, 1168; Petitioner's Appendix at p. A4-5, A8. In so doing, the Circuit Court emphasized the fact that Harvey, being a participant in and eyewitness to the murder, was in a position to know whether respondent was involved, and yet his statement, while relating in detail his own involvement and that of all others in the killing, and while purporting on its face to recount everything he knew about the killing, made no mention of Respondent's presence or participation. Id. Also emphasized on this score was the fact that Harvey's statement indicated that he had obtained his weapon on the evening of the murder from the trunk of his co-participant's car, rather than, as the prosecution's key witness testified, from the Respondent. Id.

Regarding the matter of the materiality of the suppressed evidence, the Circuit Court determined that since Victor Harvey's statement was specifically requested the applicable test was whether there was a substantial basis for claiming that the statement was material, 575 F.2d at 1168-69; Petitioner's Appendix at p. A7-10. The court further concluded that this test had been satisfied,² given the exculpatory character of the statement and the fact, as found by the district judge, that it was likely that the defense would have called Harvey as a witness at trial had his statement been disclosed, Id.

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2. It should be observed that the District Court concluded that Respondent had satisfied a more stringent standard of materiality, since it found that Respondent had "demonstrated that there is at least a 'substantial basis' for the claim that the omitted evidence creates a reasonable doubt which did not otherwise exist." 428 F.Supp. at 409; Petitioner's Appendix at p. A18-19. The Circuit Court did not address this aspect of the District Court's decision.

In effect, the Circuit Court properly concluded, on the basis of extensive, detailed and unassailable findings of fact rendered by the District Court, that each of the predicates of a due process violation had been established in this case. Nothing was said or decided which conflicts in any way with the decisions of this Court. Nor were any important and unsettled issues of constitutional law decided.

In offering a contrary characterization of the decision below, Petitioner points to the Circuit Court's observation that this case "presents an unusual question" as to whether under this Court's decisions "an eyewitness statement suppressed by the government can be exculpatory where it makes no reference to the defendant." 575 F.2d at 1165; Petitioner's Appendix at A1. Furthermore, Petitioner argues that this "unusual question" was decided below in a manner inconsistent with this Court's decisions. Petitioner's Brief at p. 7. Clearly, this argument fails on several grounds.

In the first place, there is nothing in this Court's decisions which even remotely suggests that an eyewitness statement cannot be regarded as exculpatory when it makes no reference to the defendant. Secondly, the Circuit Court did not treat this question as one of law, rather it ruled that whether suppressed evidence is exculpatory is "an issue of fact," 575 F.2d at 1166; Petitioner's Appendix at p. A4.

Thirdly, and more importantly, both logic and precedent combine to support the Circuit Court's observation that an eyewitness statement which makes no mention of a defendant's participation in a crime "must be viewed as potentially powerful exculpation." 575 F.2d at 1168; Petitioner's Appendix at p. A8. Indeed, the Circuit Courts have quite often set aside convictions because of prosecutorial suppression of this type of evidence. See eg., Cannon v. State of Alabama, supra;

is a specific request case, the decision below on this issue is not in conflict with this Court's decisions.

In a further attempt to buttress its characterization of the decision below, the Petitioner asserts that since Victor Harvey had provided the defense with a statement "substantially similar" to the one which the prosecution failed to disclose, the Circuit Court's decision that Harvey's statement was suppressed is at odds with this Court's decisions. Petitioner's Brief at pp. 6, 8-11. To support this assertion, Petitioner relies principally on the proposition expressed by this Court in Agurs, supra at 103, that "[t]he rule of Brady ... involves the discovery after trial of information which had been known to the prosecution but unknown to the defense."

This effort by Petitioner to present the decision below as being novel and conflicting must also fail. The problem with Petitioner's argument is that it ignores entirely the extensive factual foundation for the Circuit Court's proper and uncontroversial determination that the suppression of evidence occurred herein.

To begin with, the Petitioner overlooks the fact that the information found to have been suppressed in this case was not what Victor Harvey said he told the police, but rather what Victor Harvey actually told the police. What Victor Harvey actually told the police is contained in the statement which the prosecution failed to disclose, despite two specific pretrial requests by the defense. Obviously, this information was not known to the defense. Indeed, it did not become known to the defense until the prosecution tendered Harvey's statement in the course of the habeas corpus proceeding herein. As such, this case quite clearly involved "the discovery after trial of information which had been known to the prosecution but unknown to the defense." Agurs, id.

Hence, the decision below, that this information was suppressed in no way conflicts with this Court's decisions.

Actually, the real thrust of Petitioner's argument is that the defense had reason to believe that Harvey had told the police exactly what he said he told them, and that, since the defense was free to call Harvey as a witness, no real harm could have resulted from the prosecution's suppression of Harvey's statement. But this argument also ignores the detailed and uncontrovertible fact-findings of the District Court, which were sustained and relied upon by the Circuit Court below.

In response to this very argument the District Court stated:

But, in fact, the defense was restrained from using Harvey as a witness by the fear that Harvey had made a statement incriminating the petitioner. This fear was generated by the State's own actions - particularly its failure to disclose Harvey's statement - and certainly was not, under the circumstances, irrational. 428 F.Supp. at 410; Petitioner's Appendix at p. A21.

But, in fact, the defense was restrained from using Harvey as a witness by the fear that Harvey had made a statement incriminating the petitioner. This fear was generated by the State's own actions - particularly its failure to disclose Harvey's statement - and certainly was not, under the circumstances, irrational. 428 F.Supp. at 410; Petitioner's Appendix at p. A21.

Among this circumstances alluded to in the above statement were the following: the fact that all charges against Harvey had been dropped, despite the fact that he was a direct participant in the killing; the fact that Harvey had been declared a material witness for the prosecution; the fact that the prosecution repeatedly denied, in open court, that Harvey's statement was exculpatory, thus giving the defense good reason to believe that it implicated the defendant; and the fact that one Robert Perry, who became the prosecution's key witness, also told the defense prior to trial that the defendant was not involved, 428 F.Supp. at 410; Petitioner's Appendix at pp. A21-22.

It should also be observed that the District Court, while deeming it unnecessary to decide whether the prosecution's conduct was "deliberately calculated to discredit the reliability of Victor Harvey as a defense witness," did never the less find "that this was the effect of the State's actions." 428 F.Supp. at 411; Petitioner's Appendix at p. A22. The District Court thus concluded that:

The State cannot, therefore, be permitted to argue now that its failure to disclose Harvey's Statement could not have prejudiced the defense. Id.

The Circuit Court reached the same conclusion in reliance upon the findings of fact rendered by the District Court. 575 F.2d at 1167-1168; Petitioner's Appendix at p. A5-7. Thus, it was stated below that the matter of what Harvey had actually told the police "was vital to the defense's decision as to whether to call Harvey." 575 F.2d at 1167; Petitioner's Appendix at p. A7.

In light of what has been said, it must be obvious that, in making the argument under discussion, the Petitioner does not call attention to an important and unsettled issue of consitutional law decided by the court below. Nor does Petitioner call attention to a conflict between the decision below and this Court's decisions. Rather, Petitioner does no more than to call attention to its disagreement with the findings of fact upon which the decision below rested in properly concluding that Respondent had been denied due process of law.

II

The Decision Below Does Not Expand
The Prosecution's Duty To Disclose
Evidence To Criminal Defendants
Under the Due Process Clause, Nor
Does It In Any Way Create Uncertainty
As To The Proper Performance Of That Duty

Petitioner contends that the decision below expands the prosecution's duty to disclose evidence to criminal defendants,

and "creates substantial confusion about the standards utilized by prosecutors in instructing their subordinates of their Brady and Agurs responsibilities...." Petitioner's Brief at pp. 6, 11-12. But these contentions are utterly devoid of merit and essentially oblivious to the fact that this case involves the prosecutorial suppression of exculpatory evidence which was twice specifically requested by the defense.

As noted previously, the decision below does not conflict with this Court's decisions. Such being the case, it certainly does not expand the prosecution's constitutional duty to disclose exculpatory evidence to criminal defendants.

Morover, it creates no uncertainty as to the proper discharge of that constitutional duty. The decision simply instructs, in total conformity with Agurs, supra at 106, that prosecutors will be held to a more exacting duty to disclose exculpatory information, when they are presented with timely and specific requests for such information. There is nothing

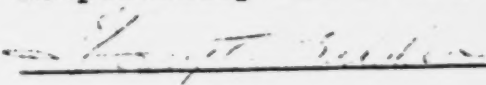
confusing about such an instruction. Furthermore, all the guidance and clarification that prosecutors need to deal with situations like that involved in the instant case has already been supplied by this Court in Agurs, supra 427 U.S. at 106.

In short, then, the decision below was reached by a straight forward application of settled constitutional principles to detailed fact findings which depicted a clear case of unconstitutional suppression of exculpatory evidence. It does not impose any new and unreasonable burdens on prosecutors, and it certainly generates no uncertainty whatsoever as to what a prosecutor should do when presented with a timely and specific request for exculpatory information.

Conclusion

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,


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